IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN/WATERLOO DIVISION

RANDY A. HODGIN, Plaintiff, vs. TRANS WORLD AIRLINES, INC., and UNITED STATES AVIATION UNDERWRITERS, INC., Defendants.	No. C03-2003 LRR **ORDER REGARDING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

On October 7, 2002, Plaintiff Randy Hodgin ("Hodgin") filed this action against Trans World Airlines, Inc., ("TWA") and United States Aviation Underwriters, Inc., ("USAU"), TWA's liability insurance carrier, in the Iowa District Court for Black Hawk County. USAU removed the matter to this court on January 9, 2003 on the basis that this court has diversity subject matter jurisdiction. USAU invokes this court's diversity jurisdiction inasmuch as complete diversity of citizenship exists between the parties and the amount in controversy exceeds $75,000.00. *See* 28 U.S.C. § 1332. Hodgin is a resident of Black Hawk County, Iowa. TWA is or was a Delaware Corporation. USAU is a New York corporation with its principal place of business in New York, New York.

Presently before the court is Defendants' Motion for Summary Judgment (docket no. 8).[1] Defendants urge the court to grant summary judgment on Hodgin's claims on the grounds that: (1) Hodgin failed to properly serve TWA with process in this action; (2)

[1] USAU filed the instant Motion for Summary Judgment on April 28, 2003. TWA joined in USAU's Motion for Summary Judgment on May 28, 2003. TWA also answered Hodgin's Complaint on May 28, 2003.

Hodgin released all of his claims against TWA; and (3) Hodgin may not maintain a direct action against USAU as an insurer.

II. STANDARD OF REVIEW

Summary judgment is appropriate only when the record, viewed in the light most favorable to the nonmoving party, shows there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Carter v. Ford Motor Co.*, 121 F.3d 1146, 1148 (8th Cir. 1997) (citing *Yowell v. Combs*, 89 F.3d 542, 544 (8th Cir. 1996)). An issue of material fact is genuine if it has a real basis in the record. *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)). A fact is material when it is a fact that "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In considering a motion for summary judgment, a court must view all facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus.*, 475 U.S. at 587. Further, the court must give the nonmoving party the benefit of all reasonable inferences that can be drawn from the facts. *Id*.

Procedurally, the moving party bears "the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record which show lack of a genuine issue." *Hartnagel*, 953 F.2d at 394 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). Once the moving party, has successfully carried its burden under Rule 56(c), the nonmoving party has an affirmative burden to go beyond the pleadings and by depositions, affidavits or otherwise, designate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324. The nonmoving party must offer proof "such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

III. STATEMENT OF FACTS

The following facts are undisputed: Hodgin claims he suffered injuries as a result

of a rapid decompression on a TWA flight on October 13, 2000. On January 10, 2001, TWA filed a Chapter 11 Bankruptcy in the United States Bankruptcy Court for the District of Delaware.

On October 16, 2001 in the United States Bankruptcy Court for the District of Delaware, Hodgin entered into a Stipulation and Agreed Order Between Randy Hodgin and the Debtors to Modify the Automatic Stay (the "Stipulation"). The Stipulation grants Hodgin "limited relief from the automatic stay of Section 392 of the Bankruptcy Code (the "Automatic Stay") so as to permit [Hodgin] to pursue the Claim." (Stipulation, page 1, paragraph 3). Paragraph 1 of the Stipulation permits Hodgin "to pursue the Claim to and including the entry of judgment, provided, however, that no judgment based on the Claim may be enforced against the Debtors, their assets, or their bankruptcy estates other than their general liability insurance policy." (Stipulation, page 2, paragraph 1) (emphasis supplied).

In the Stipulation, Hodgin agreed to collect damages only from USAU and that any judgment against TWA in its nominal capacity is enforceable against USAU. The Stipulation provided Hodgin would:

> collect all monetary or other forms of remuneration or relief to which [Hodgin] may be entitled to in connection with the Claim, if any, only from the Debtors' insurance carrier under the Debtors' general liability insurance policy. The Debtors represent that the Debtors' insurance carrier acknowledges that any monetary judgment entered against the Debtors, soley in the Debtors' nominal capacity as described herein, will have the same force and effect as if entered against the Debtors' insurance carrier, to the extent the insurance policy covers the Claim, and shall be enforceable against the Debtors' insurance carrier to the extent of the applicable coverage limits or the amount of the judgment, whichever is less.

(Stipulation, page 2, paragraph 2).

Hodgin also released TWA from all actions relating in any way to the Claim:

> [Hodgin] hereby fully, finally and forever releases and discharges the debtors and their bankruptcy estate, and their respective officers, directors, employees, agents and attorneys from any and all actions, claims . . . causes of action, set offs, liabilities for any obligation resulting in any way to the claim.

(Stipulation, page 2, paragraph 3).

The Stipulation further provided that the United States Bankruptcy Court for the District of Delaware "shall retain jurisdiction (and the Claimant consents to such retention of jurisdiction) to resolve any disputes or controversies arising from or related to this Stipulation." (Stipulation, page 3, paragraph 6).

By Order Confirming Joint Liquidation Plan dated June 14, 2002, the United States Bankruptcy Court for the District of Delaware dissolved and terminated the existence of TWA. On August 5, 2002, the Iowa Secretary of State revoked TWA's certificate of authority to conduct business in Iowa because TWA failed to deliver a 2002 biennial report to the Iowa Secretary of State. On October 7, 2002, Hodgin filed suit against TWA in the Iowa District Court for Black Hawk County. On December 10, 2002, the Polk County Sheriff served CT Corporation, TWA's registered agent listed with the Iowa Secretary of State, with Hodgin's Original Notice, Petition and Jury Demand. USAU was served pursuant to a Black Hawk County District Court Order dated December 5, 2002.

IV. DISCUSSION

A. Whether TWA Was Properly Served

The issue in this case is whether service of process was proper on CT Corporation, TWA's registered agent. The sufficiency of service of process in a removed action is analyzed under state law because service of process occurs before removal. *Marshall v. Warwick*, 155 F.3d 1027, 1033 (8th Cir. 1998) (citing *Lee v. City of Beaumont*, 12 F.3d 933,

937 (9th Cir. 1993) and 14A Charles Alan Wright et al., *Federal Practice and Procedure* § 3738, at 561 (2d ed.1985)). Service of process on foreign corporations is governed by Iowa statute. Iowa Code § 490.1531 controls service of process and the maintenance of registered agents for foreign corporations whose certificate of authority has been revoked:

> 4. The secretary of state's revocation of a foreign corporation's certificate of authority appoints the secretary of state the foreign corporation's agent for service of process in any proceeding based on a cause of action which arose during the time the foreign corporation was authorized to transact business in this state. Service of process on the secretary of state under this subsection is service on the foreign corporation. Upon receipt of process, the secretary of state shall mail a copy of the process to the secretary of the foreign corporation at its principal office shown in its most recent biennial report or in any subsequent communication received from the corporation stating the current mailing address of its principal office, or, if none is on file, in its application for a certificate of authority.
> 5. Revocation of a foreign corporation's certificate of authority does not terminate the authority of the registered agent of the corporation.

Iowa Code § 490.1531(4) and (5). TWA contends that service of process on CT Corporation was ineffectual because Hodgin did not serve the Iowa Secretary of State as directed by Iowa Code § 490.1531(4). In response, Hodgin argues that he properly served TWA by serving the registered agent listed by the Iowa Secretary of State because pursuant to Iowa Code § 490.1531(5), the registered agent's authority does not terminate when the foreign corporation's certificate of authority is revoked.

TWA further argues that service of process on CT Corporation on December 10, 2002 was ineffectual because any agency relationship between TWA and CT Corporation did not exist at the time of service of process because TWA was dissolved, liquidated in bankruptcy, and no longer existed. In response, Hodgin contends that service on CT

Corporation was proper because under Iowa Code § 490.1405(2)(g), dissolution of a corporation does not "[t]erminate the authority of the registered agent of the corporation."

At common law, the dissolution of the principal terminated the agency relationship. *See, e.g., Furenes v. Eide*, 80 N.W. 539, 540 (Iowa 1899) ("an agency is dissolved by the death of the principal. . . ."). Iowa law has abrogated common law by continuing the authority of a registered agent after dissolution and after revocation of a foreign corporation's certificate of authority. *See* Iowa Code §§ 490.1531(5) and 490.1405(2). A registered agent's authority includes the authority to accept service of process for its corporation. Iowa Code § 490.504(1) ("A corporation's registered agent is the corporation's agent for service of process . . . ."). To require service of process on the secretary of state as the sole means of serving a dissolved corporation whose certificate of authority has been revoked would be to ignore the statutory language "[r]evocation of a foreign corporation's certificate of authority does not terminate the authority of the registered agent of the corporation," *see* Iowa Code § 490.1531(5), and that dissolution does not "[t]erminate the authority of the registered agent of the corporation," *see* Iowa Code § 490.1405(2)(g).

Additionally, the public has a right to rely upon the Iowa Secretary of State's records indicating the existence of a registered agent. In this case, the Iowa Secretary of State's records continue to indicate that CT Corporation is TWA's registered agent. Moreover, TWA has presented no evidence that it has terminated the authority of CT Corporation to accept service of process on TWA's behalf. The court thus holds that TWA maintained CT Corporation as its registered agent for purposes of service of process. This portion of Defendants' Motion for Summary Judgment is therefore denied.

B. Whether Hodgin Released His Claims Against TWA

Defendants contend Hodgin's claims against TWA must be dismissed because the Stipulation fully released TWA and did not reserve the right to name TWA as a nominal party. In response, Hodgin contends that when the Stipulation is read as a whole, it is clear

that the parties intended for Hodgin to be permitted to pursue his claim against TWA as a nominal party for purposes of establishing a liability and damage judgment.

The court finds that resolution of this dispute would require interpretation of substantive provisions of the Stipulation. The United States Bankruptcy Court for the District of Delaware explicitly retained jurisdiction over matters arising from or related to the Stipulation: "This Court shall retain jurisdiction (and the Claimant consents to such retention of jurisdiction) to resolve any disputes or controversies arising from or related to this Stipulation." (Stipulation, page 3, paragraph 6). The court thus finds that jurisdiction over whether Hodgin fully released his claims against TWA does not lie in this court. In order to minimize the possibility of conflicting interpretations of the Stipulation or its effects, the court holds that the parties must present their dispute to the United States Bankruptcy Court for the District of Delaware. This portion of Defendants' Motion for Summary Judgment is therefore denied.

C. Whether Hodgin May Maintain A Direct Action Against USAU

USAU argues that Hodgin's claim against it is barred by Iowa's "direct action" statute, Iowa Code § 516.1.[2] USAU contends that the prerequisites to an action under Section 516.1 have not been met because Hodgin has not obtained a judgment against USAU's insured, TWA. In response, Hodgin argues that: (1) Section 516.1 is inapplicable

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[2] Iowa Code § 516.1, provides:

> All policies insuring the legal liability of the insured, issued in this state by any company, association or reciprocal exchange shall, notwithstanding any other provision of the statutes, contain a provision providing that, in event an execution on a judgment against the insured be returned unsatisfied in an action by a person who is injured or whose property is damaged, the judgment creditor shall have a right of action against the insurer to the same extent that such insured could have enforced the insured's claim against such insurer had such insured paid such judgment.

in this case because the insurance policy provided by USAU was not "issued in this state;" (2) if Section 516.1 applies, this court should recognize an exception to Section 516.1 because this case involves a unique situation in which TWA is a nominal party who has filed bankruptcy and eliminated the ability of Hodgin to collect a judgment against TWA; and (3) USAU's remedy should be a bifurcated trial rather than summary judgment.

Hodgin urges this court to recognize an exception to the "direct action" bar contained in Section 516.1. However, Hodgin has not cited any Iowa case law or statute recognizing an exception to the bar against direct actions where the insurance policy was not issued in Iowa. The court finds that absent an express or clearly implied right to sue an insurer directly, an injured person cannot maintain an action directly against an insurer, at least until after settlement, adjudication, or release of the claim. The fundamental legislative public policy in Iowa, evidenced by Iowa Code § 516.1, provides that an insurer cannot be sued directly without first obtaining a judgment against the insurer. By its plain terms, Iowa Code § 516.1 provides an injured party with a direct action against the insured if the injured party has first obtained a judgment against the insured and execution upon that judgment has been returned unsatisfied. *See also Iowa Mut. Ins. Co. v. McCarthy*, 572 N.W.2d 537, 541 (Iowa 1997). Until the legislature enacts a statute which permits a direct action against an insurer, regardless of where the policy was issued, this court declines to participate in judicially legislating such a policy. Allowing this action to proceed against USAU would provide for a potential for multiplicity of lawsuits, i.e., a direct claim against the insurer and a tort claim against the insured, which both arise out of the same incident. The court therefore grants summary judgment in favor of USAU.

V. CONCLUSION

IT IS THEREFORE ORDERED that:

1. Defendants' Motion for Summary Judgment (docket no. 8) is GRANTED and DENIED as set forth above.

2. The claims of Plaintiff Randy A. Hodgin against United States Aviation Underwriters, Inc., in the above-referenced cause of action are dismissed without prejudice.

3. The clerk of court shall amend the caption to reflect the removal of United States Aviation Underwriters, Inc., as a party to this case.

4. The parties are encouraged to explore settlement.

IT IS SO ORDERED this 3rd day of March, 2004.

LINDA R. READE
JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA